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Where Are Your Papers? Photo Identification as a Prerequisite to Voting

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WHERE ARE YOUR PAPERS? *PHOTO IDENTIFICATION AS A PREREQUISITE TO VOTING**

*Michael J. Kasper***

ABSTRACT

Remember the old war movies? Richard Attenborough or William Holden is slowly walking down misty Parisian streets, the collar of his trench turned up, the brim of the fedora pulled low. A black sedan screeches around the corner and screams to a stop in front of him before he has time to react. Soldiers bound from the car, pistols drawn, and bark "*Vhere are your papers*?"

When did America become this movie? The U.S. Supreme Court will take up this question this term. This article explores five recent state laws, from Indiana, Arizona, Georgia, Michigan, and Missouri requiring citizens to present proof of identity, in the form of a government issued photo identification card, as a prerequisite to voting in a polling place on Election Day. In *Crawford v. Marion County Elec. Bd.*, the Seventh Circuit upheld an Indiana election law that required virtually all voters to show a government-issued photo identification in order to vote on Election Day. On September 25, 2007, the United States Supreme Court granted the petition for a writ of certiorari in *Crawford* and will decide the constitutionality of these so-called "voter identification" laws. This article examines these laws under the First and Fourteenth Amendment and concludes that these statutes, although they do not impose a severe burden on the right to vote, should nonetheless be invalidated.

I. INTRODUCTION

We have all seen the movies: Richard Attenborough or William Holden slowly walking down a misty, Parisian street, wearing a trench coat with the collar turned up, and the brim of the fedora pulled low. A

* The Supreme Court has taken a position on this subject. *See* Crawford v. Marion County Elec. Bd., 128 S. Ct. 1610.

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black sedan screeches around the corner and screams to a stop in front of him before he has time to react. Soldiers bound from the car, pistols drawn. In the next scene, he sits in a dark, windowless room lit only by a single desk-top banker's lamp. Behind the tidy desk, a thin, menacing looking officer with a stiff collar buttoned tight, pulls on a cigarette, opens the file, looks up, and says to the prisoner, "*Vhere are your papers*?"

When did America become this movie? The U.S. Supreme Court will decide that very question this term.[1] The easy answer is, of course, that America became this movie in the aftermath of September 11, 2001,[2] when Americans became accustomed to showing identification for the purpose of maintaining safety and security at airports and other public places. These inconveniences have been accepted as the price to pay to maintain that safety. Several years later, have these habits dulled our sensitivity to unnecessary or even ill-intended demands that we identify ourselves to government officials?

Certainly it is a long way from the jack-booted soldiers from the old war movies, Americans must now identify themselves more often than ever before. This article explores five recent state laws from Indiana, Arizona, Georgia, Michigan, and Missouri requiring citizens to present proof of identity, in the form of a government issued photo identification card, as a prerequisite to voting in a polling place on Election Day.[3] None of these laws were enacted for the purpose of safety or security, but instead were passed purportedly to combat in-person voter fraud by making it more difficult to impersonate another person and illegally vote on another's behalf.

Each of these laws faced a constitutional challenge on the basis they disproportionately impacted minorities, the poor, and elderly who are less likely to have a photo identification card than those more affluent. In *Crawford v. Marion County Election Bd.,* the Seventh Circuit upheld an Indiana election law that required virtually all voters to show a government-issued photo identification card in order to vote on Election Day.[4] Similarly, in *Gonzalez v. Arizona*, the Ninth Circuit up-

1. Crawford v. Marion County Election Bd., 128 S. Ct. 33 (2007) (No. 07-21); Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007) (No. 07-25).

2. *See* United States v. Smith, 426 F.3d 567, 570 (2d Cir. 2005) ("the requirement of showing a photo identification was part of a new policy implemented after the events of September 11, 2001, to protect federal buildings and courthouses").

3. IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2007); GA. CODE ANN. § 21-2-417 (2007). ARIZ. REV. STAT. § 16-579 (2007); MICH. COMP. LAWS SERV. §168-523 (2005); MO. ANN. STAT. § 115.427 (2006).

4. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *rehearing denied*, 484 F.3d 436 (7th Cir. 2007), *aff.g*, 128 S. Ct. 1610 (2008)

held an Arizona statute requiring photo identification as a condition of voter registration.[5] On the other hand, in *Common Cause/Georgia v. Billups,*[6] the District Court in the Northern District of Georgia initially enjoined enforcement of the Georgia voter identification requirement for the 2006 election, but recently dismissed the challenge and upheld the law.[7]

At the state level, the Michigan Supreme Court recently issued an advisory opinion at the request of the House of Representatives validating the Michigan photo identification law.[8] On the other hand, the Supreme Court of Missouri invalidated that State's voter identification statute in *Weinshenk v. Missouri*.[9]

To straighten out this conflict between State laws, on September 25, 2007, the Supreme Court granted the petition for a writ of certiorari in *Crawford* and will tackle the issue this term.[10] This article will examine whether these laws are permissible under the First and Fourteenth Amendment and demonstrate why these statutes, although they do not impose a severe burden on the right to vote, should nonetheless be invalidated.[11]

II. THE VOTER IDENTIFICATION LAWS AND THEIR CHALLENGES

A. The Indiana Voter Identification Statute

In upholding the Indiana law in *Crawford*, the Seventh Circuit ruled that the identification law imposed only a slight burden on a

5. Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007).

6. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006).

7. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

8. In re Request for Advisory Opinion Regarding Constitutionality of 2005, 740 N.W.2d 444 (Mich. 2007).

9. Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).

10. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 33, 33 (2007), *aff'd*, 128 S. Ct. 1610 (2008).

11. Each of these cases also addressed, at one stage of the litigation, the issue of whether or not the voter ID statute constituted an unconstitutional poll tax in violation of the 24th Amendment to the United States Constitution. Each of the federal courts rejected this argument (*See* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007); *Gonzalez*, 485 F.3d at 1049; *Billups*, 439 F. Supp. 2d at 1354). The Michigan Supreme Court likewise rejected the notion that its voter ID was a poll tax. *In re Request for Advisory Opinion*, 740 N.W.2d at 464-65. The Supreme Court of Missouri did not specifically call the voter ID law a poll tax, but did rule that because the exercise of the right to vote was predicated upon the expenditure of money it was unconstitutional. *Weinschenk*, 203 S.W.3d at 213. This article, due to the unanimity of the federal courts on this issue, will address only the First and Fourteenth amendment issues.

minimal number of potential voters.[12] Indeed, Judge Posner's opinion begins with the proposition that "the benefits of voting to the individual are elusive" because elections "are never decided by just one vote."[13] This observation, while certainly correct regarding outcomes, nonetheless seems a striking dismissal of the very foundation of our nation. As the Supreme Court has recognized, "the right to exercise the [voting] franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . "[14] The benefits of voting arise not from deciding the outcome, but from participating in the process unfettered by the barriers, both real and imagined, that plague elections throughout much of the world.

Judge Posner also seemed impressed that "there is not a single plaintiff who intends not to vote because of the new law — that is, who would vote were it not for the new law."[15] While lack of a victim to step forward is certainly relevant, it is also understandable. If a person is too intimidated by the photo identification requirement to expend thirty minutes to go from home only a few minutes to the local polling place, it should hardly be surprising that that same person would be reluctant to lend his or her name to litigation which would result in having their name plastered all over every newspaper in the country.

For Judge Posner, the case can be summed up quite simply. First, the vast majority of adults has the identification necessary to satisfy the law and is accustomed to using it in their daily lives: "try flying, or even entering a tall building such as the courthouse in which we sit, without one."[16] Second, no one complains, other than political groups, that the law has actually discouraged them from voting. On the other hand, the purpose of the law is to reduce voter fraud by detecting a person impersonating another in order to illegally cast his or her ballot.[17]

In his dissent, Judge Evans points out that Indiana already had a criminal law punishing voter fraud with up to three years in prison and a $10,000 fine, and "no one – in the history of Indiana – had ever been charged with violating that law."[18] Judge Posner brushes this aside, attributing the absence of prosecutions not to the lack of commission of the crime, but instead to the "endemic under[-]enforcement

12. *Crawford*, 472 F.3d at 951.
13. *Id.* (emphasis added).
14. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
15. *Crawford*, 472 F.3d at 952.
16. *Id.* at 951.
17. *Id.* at 952.
18. *Id.* at 955 (Evans, J., dissenting).

of minor criminal laws", and the "extreme difficulty in apprehending a vote impersonator."[19]

B. The Arizona Voter Identification Proposition

In the November 2004 General Election, Arizona voters approved Proposition 200 which required proof of citizenship as a prerequisite to registration and identification for in-person voting.[20] The proof of citizenship permitted included: a driver's license, state issued non-driving identification, birth certificate, passport, or other documents deemed acceptable under federal immigration laws.[21] In May 2006 a group of voters, civic organizations and Native American groups filed suit seeking an injunction against both the registration and voting elements of the identification law.[22]

The plaintiffs appealed the District Court's denial of a preliminary injunction, and shortly before the November 2006 General Election, the Ninth Circuit Court of Appeals enjoined enforcement of the proposition.[23] The State sought relief from the Supreme Court, which approximately two weeks before the election vacated the Ninth Circuit order and remanded the case for further proceedings. In reaching its conclusion, the Supreme Court did not address the merits of the voter identification requirements but instead relied upon the procedural posture of the case.[24]

When the District Court denied the preliminary injunction it did not issue any findings of fact or conclusions of law.[25] When the Ninth Circuit effectively reversed the District Court by issuing the injunction, it likewise did not issue a written explanation but instead issued a "bare order" without explanation or justification.[26] The Supreme Court, in vacating the injunction, ruled "[i]t was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court."[27] Because there was no evidence that the Court of Appeals had done so, the Supreme Court vacated the order.[28]

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19. *Id.* at 953.
20. Gonzalez v. Arizona, 485 F.3d 1041, 1046 (9th Cir. 2007).
21. *Id.* at 1047.
22. *Id.* at 1046.
23. *Id.*
24. Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (No. 06-532).
25. *Id.* at 7.
26. *Id.*
27. *Id.*
28. *Id* at *6.

Upon remand, the Ninth Circuit noted that the plaintiffs "chose not to continue to seek injunctive relief with respect to the in-person voting identification requirement."[29] In dealing with the identification requirement for voter registration however, the Ninth Circuit effectively upheld the same requirement for in-person voting.[30] Like Judge Posner's decision in *Crawford*, the Ninth Circuit decision began with the presumption that "the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration . . . "[31] The Court then refused to find that the identification requirement was "at this stage in the proceedings" a severe burden on the right to vote, because the plaintiffs' evidence consisted of only "four declarations from individuals who are not parties to the litigation."[32]

C. Georgia's Voter Identification History

The Georgia legislature first passed a voter identification statute in 1997,[33] which allowed Georgia voters to use one of seventeen different forms of identification as a pre-condition to entering a polling place and voting.[34] Voters were not required to show photo identification and were permitted to use things such as utility bills, bank statements or payroll checks.[35] Moreover, voters completely lacking identification were also permitted to vote by executing an affidavit of eligibility in the polling place.[36]

Since Georgia is a covered jurisdiction under Section 5 of the Voting Rights Act[37], the 1997 statute required pre-clearance by the Department of Justice.[38] The Department granted pre-clearance because

29. Gonzalez v. Arizona, 485 F.3d 1041, 1046-47 (9th Cir. 2007).

30. *Id.*

31. *Id.* at 1050.

32. *Id.*

33. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006); GA. CODE ANN. § 21-2-417 (2007).

34. GA. CODE ANN. § 21-2-417 (2007).

35. *Id.*

36. *Id.*

37. Voting Rights Act, 42 U.S.C. § 1973 (2000). Under Section 4 of the Voting Rights Act, any state that maintained a test or device that denied or abridged the right to vote on the basis of color and which and had less than a 50% voter registration rate on November 1, 1964 or had less than 50% turnout in the November, 1964 election became a "covered jurisdiction" subject to the preclearance requirements of Section 5.

38. *Billups*, 439 F. Supp. 2d at 1303.

the statute contained sufficient safeguards to ensure that "no voters would be turned away if they did not have proper identification."[39]

In 2005, the Georgia legislature enacted a new law requiring all voters to present a government issued photo identification card in order to vote in a polling place on Election Day.[40] Although the "career staff in the Voting Section of the [Department of Justice]" recommended denial on August 25, 2005, the Department granted preclearance the very next day.[41] After that law was enjoined by the District Court, the Georgia General Assembly re-enacted another voter identification law in 2006[42] which replaced the 2005 "affidavit of poverty" to obtain state voter identification with a specific "Georgia voter identification card" for those lacking any other acceptable forms of identification.[43] The District Court then took up the question of the constitutionality of the 2006 Act.[44]

As with the Indiana statute in *Crawford*, Georgia officials had not received any complaints of in-person voter fraud since the statute was first enacted in 1997.[45] Additionally, the District Court of the Northern District of Georgia found that "the possibility of someone voting under the name of a deceased person has been addressed by [the Secretary of State's] monthly removal of recently deceased persons from the voter roles."[46] Unlike the Indiana litigation, in *Billups* a number of "would-be Georgia voters" presented evidence that they did not have the requisite identification and "have no need for them in their day-to-day lives" and would be affected by the voter identification statute.[47] As a result, the District Court concluded that the 2006 statute was "not narrowly tailored to the State's proffered interest of preventing voter fraud."[48]

The Georgia statute applied only to in-person voting, but the District Court found that the "evidence addressed fraud in the area of voter registration and absentee voting, rather than in-person voting."[49] The District Court further recognized that the State had less restric-

39. *Id.* at 1304.

40. *Id.* at 1304.

41. *Id.*

42. *Id.* at 1298.

43. *Id.* at 1305.

44. *Id.* at 1300.

45. *Id.* at 1350; *see also* Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007).

46. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006).

47. *Id.* at 1312; *Cf. Crawford*, 472 F.3d at 951-952.

48. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006).

49. *Id.*

tive alternatives to the 2006 Act, such as criminal statutes penalizing voter fraud and the identification requirement of the previous law, which no one had ever been accused of violating.[50] As a result, the Court enjoined enforcement of the 2006 law for the 2006 election[51].

After a long and somewhat torturous procedural history, the District Court held a three-day bench trial in August 2007[52], and on September 6, 2007, the case was dismissed after finding none of the plaintiffs had standing to bring the action.[53] Nonetheless, the District Court went on to discuss the merits of the case and concluded it would have upheld the statute because the "plaintiffs simply have failed to prove that the character and magnitude of the asserted injury to the right to vote is significant."[54] In particular, the District Court noted each of the named plaintiffs testified they would have obtained the necessary identification without much inconvenience if the statute were upheld.[55]

The District Court also took solace in the voter education efforts the State had undertaken to inform citizens about the law and ultimately concluded that the plaintiffs simply have not presented sufficient admissible evidence to show that the Photo ID requirement severely burdens the right to vote.[56] As a result, the Court refused to apply the higher threshold of strict scrutiny and concluded that the statute was rationally related to the state's interest in preventing voter fraud.[57]

D. The Michigan Voter Identification Law

The Michigan Supreme Court tackled the issue of Michigan's voter photo identification law after the Michigan House of Representatives requested its opinion pursuant to the Michigan Constitution.[58]

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50. *Id.* at 1351.

51. *Id.* at 1360.

52. *Id.* at 1342.

53. *Id.* at 1374. This finding is in direct conflict with the Seventh Circuit's decision in *Crawford*, which specifically held that the Democratic Party had standing to challenge the Indiana law. Crawford v. Marion County Election Bd., 472 F.3d 949, 951 (7th Cir. 2007).

54. *Id.*

55. *Id.* at 1377-78.

56. *Id., quoting Rotika*, 458 F. Supp. 2d 775 ("Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the 2006 Photo ID Act])."

57. *Id.* at 1312.

58. In re Request for Advisory Opinion Regarding Constitutionality of 2005, 740 N.W.2d 444, 449 (Mich. 2007).

The Michigan legislature passed a law in 1996 requiring all would-be voters to show photo identification as a precondition to voting in a polling place on Election Day. However, this law has never been enforced on Election Day because the Attorney General in 1997 issued an opinion that the law violated the Fourteenth Amendment.[59] The Michigan legislature subsequently re-enacted the 1996 voter identification provisions in 2005 and sought the Michigan Supreme Court's opinion.[60]

The Michigan Supreme Court ruled that the voter identification requirement was constitutional because it did not impose a severe burden on voters' rights.[61] The Michigan court, in particular, stressed "the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being 'allowed to vote.'"[62] The Michigan Supreme Court then concluded that "the affidavit alternative to the photo identification requirement imposes less of a burden than is imposed on those voters who are required to execute a sworn statement before casting a provisional ballot."[63] As a result, "[t]here is simply no basis to conclude that requiring an elector to sign an affidavit as an alternative to presenting photo identification imposes a severe burden on the right to vote."[64]

As in the other cases, the Michigan Supreme Court was not presented with any evidence that in-person voting fraud had ever occurred in Michigan. That absence did not long occupy the Michigan court, which instead concluded "there is no requirement that the Legislature 'prove' that significant in-person voter fraud exists before it may permissibly act to prevent it."[65] In other words, the legislature need not be constrained to solving existing problems, but as long as they are all present in the Capitol anyway, why not also take a stab at nonexistent problems as well?

E. Missouri's Voter Identification Law

In 2006, the Missouri legislature enacted a statute requiring voters to present federal or state issued identification in order to cast ballots on Election Day.[66] A group of voters sued, claiming that the

59. *Id.* at 1.
60. *Id.* at 5.
61. *Id.* at 6.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006); MO. ANN. STAT. § 11.427 (2006).

law adversely impacted "low-income, disabled or elderly" citizens by violating their right to vote and denying them equal protection under the Missouri Constitution.[67] The Supreme Court of Missouri prefaced its consideration by noting that the rights to vote and equal protection protected by the Missouri constitution were "even more extensive than those provided by the federal constitution."[68] In striking down the statute, the Missouri Court conducted the same analysis as the federal courts in *Crawford*, *Gonzalez*, and *Billups*.[69]

Unlike *Crawford*, the Missouri plaintiffs lacked the requisite identification necessary to vote but were all otherwise eligible to vote.[70] As a result, in order to be eligible to vote in the 2008 election, each of the plaintiffs would be required to obtain the necessary identification.[71] Because the process of obtaining the identification required both the expenditure of money and time, the voter identification system imposed a "substantial burden" on the right to vote and the Missouri Supreme Court subjected the statute to strict scrutiny.[72]

The Missouri court next concluded the state had a significant, compelling and important interest in combating voter fraud.[73] With that established, however, the Missouri Supreme Court went on to conclude that the statute was not necessary to achieve this compelling interest and the statute was not "narrowly drawn to address the compelling interest at stake."[74] The Missouri Supreme Court stated the statute was not necessary because "[n]o evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicated that voter impersonation fraud is not a problem in Missouri."[75] The only "specific instance of possible vote fraud" involved an attempt by a person who had already voted absentee to vote in-person, an instance that the photo identification requirement would not have addressed.[76]

Because the photo identification requirement "could only prevent the particular type of voter fraud that the record does not show

67. *Id.*

68. *Id.*

69. *See generally* Crawford v. Marion County Election Bd., 472 F.3d 949, 949 (7th Cir. 2007), Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007) and, Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

70. *Weinschenk*, 2003 S.W.3d. at 213.

71. *Id.*

72. *Id.* at 215.

73. *Id.* at 217.

74. *Id.*

75. *Id.*

76. *Id.* at 205.

existing in Missouri", the statute was not narrowly tailored to achieve the State's compelling interest, and therefore violated the equal protection clause of the State constitution.[77]

III. Measuring the Constitutionality of Election Related Laws

The fact there is no evidence that voter impersonation ever occurs does not necessarily lead to the conclusion that the photo identification requirements are unconstitutional. Theses laws raise a conflict between two competing interests: (1) deterring unlawful impersonation of a voter, and (2) access for all eligible voters. As Justice Stevens, in concurring that *Gonzalez* should be remanded, stated: "two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements."[78]

There can be little dispute that the photo identification requirement imposes a burden upon the right to vote. This is so because the law requires the potential voter to do something they previously were not required to do; open their wallet and present identification.[79] Ordinarily a statute will survive a challenge if it is rationally related to the accomplishment of a legitimate state interest.[80] However, if the challenged statute implicates a fundamental right, it must satisfy strict scrutiny by being narrowly tailored to achieve a state's compelling interest.[81] The Supreme Court recognized voting as a fundamental right in *Reynolds v. Sims*,[82] which should lead to the application of strict scrutiny.

In evaluating election related laws the Supreme Court has concluded neither simple rational basis review nor strict scrutiny are appropriate since "as a practical matter, there must be a substantial

77. *Id.* at 219.

78. *Id.* (Stevens, J., concurring).

79. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (any provision which regulates the selection and eligibility of candidates "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends").

80. Ry. Express v. New York, 336 U.S. 106 (1949).

81. Skinner v. Oklahoma, 316 U.S. 535 (1942).

82. Reynolds v. Sims, 377 U.S. 533, 561 (1964) ("the right of suffrage is a fundamental matter in a free and democratic society").

regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process."[83]

The Supreme Court's logic is rational basis review is not appropriate because it would in all likelihood result in an undue burden on a person's right to vote and the state's law would be upheld. Likewise, strict scrutiny is too stringent a standard and would result in virtually all voting regulations being invalid due to the existence of a less restrictive alternative. For example, virtually every state requires prospective candidates to file a nominating petition signed by a number of eligible voters in order to qualify for the ballot.[84] The purpose of this requirement is to limit the ballot to those candidates who have demonstrated a sufficient modicum of support amongst the electorate.[85] If such laws were subject to strict scrutiny then all such laws would be invalid. No matter how low the state sets the signature threshold, a less restrictive alternative would always be available until any signature requirement greater than the one already set would be impermissible. Indeed, the Supreme Court has specifically concluded that:

> To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system creates barrier . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel strict scrutiny.[86]

Recognizing this difficulty, the Supreme Court has articulated a balancing test for cases involving regulations of elections and voting.[87] In reviewing such laws, the Court has directed reviewing courts to undertake the following analysis:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing

83. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

84. *See* 10 ILL. COMP. STAT. 5/7-10 (2006).

85. Munro v. Socialist Workers Party, 479 U.S. 189 (1986) ("an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organizations' candidate on the ballot").

86. *Burdick*, 504 U.S. at 433.

87. In his dissenting opinion in *Crawford*, Judge Evans describes this balance as "strict scrutiny light." Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

> judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.[88]

The "rigorousness" of this inquiry depends on the "extent to which a challenged regulation burdens First and Fourteenth Amendment rights."[89] "Severe" restrictions must be narrowly drawn to advance a state's interest of "compelling importance."[90] On the other hand, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[91]

The irony of these voter identification cases is that the statutes are designed to prevent a crime that no one seems to be committing, based upon the lack of evidence of such crimes in the records before the courts. On the other hand, the laws do not appear to discourage many, or in the case of Indiana, any people from voting. As a result, this realization begs the question - what gives? If this law discourages few voters and prevents no crimes, why on earth was it pending before the Supreme Court?

IV. The Politics of Voter Identification Laws

"Lets not beat around the bush", begins Judge Evans' biting dissent in *Crawford*. "The Indiana voter identification law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[92] Even Judge Posner recognized that "most people who don't have photo identification are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates."[93] Indeed, the District Court specifically recognized that "this litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts."[94] The fact that the Indiana Democratic Party was the lead plaintiff says enough about which side won that legislative battle.

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88. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

89. *Burdick*, 504 U.S. at 433.

90. *Id.*

91. *Id.*

92. *Crawford*, 472 F.3d at 954 (Evans, J., dissenting).

93. *Id.* at 951.

94. *Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2005).

Likewise, although Arizona voters approved Proposition 200 by popular referendum, they did so on the same day they selected George Bush for President by a vote of 54.9% versus John Kerry's 44.5%.[95] Thus it is fair to say, at least in November 2004, Arizona was a Republican state.

Similarly in Georgia, passage of both the 2005 and 2006 voter identification laws was overwhelmingly partisan. In the Georgia House of Representatives, eighty-nine Republicans and two Democrats voted in favor of the law.[96] In the Georgia Senate, "thirty one Republicans . . . voted to approve . . . the Act, while eighteen Democrats and two Republicans voted against it."[97] The passage of the 2006 Act was equally partisan, with the House Committee on Government Affairs approving the bill on a straight party-line vote on the very first day of session.[98] In the end, the bill passed the Georgia Senate by a landslide vote of 32 in favor (all Republicans) and 22 against (21 Democrats and 1 Republican).[99]

Finally, passage of the Missouri law was no less partisan. "The Missouri General Assembly passed the law . . . in the last week of this year's legislative session after a contentious Senate debate in which Democrats mounted a filibuster to block the bill. The Republican-controlled Senate approved a rarely used motion to cut off debate and forced its passage."[100]

In a related but more ironic development, one federal court has even ordered the implementation of a voter identification requirement for primary elections, but at the behest of the Democrats.[101] In *Mississippi Democratic Party v. Barbour*, the State Democratic Party sued to close its primary by imposing a party registration requirement.[102] The Party sought to exercise its associational rights by limiting participation in its primary elections to pre-registered Democrats, and accordingly disassociating with anyone not so registered.[103] The District Court for the Northern District of Mississippi, however, not only allowed the pre-registration but also implemented a voter identification requirement in order to allow the Party to verify the identity of its

95. http://www.command-post.org/2004/2_archives/cat_arizona.html.

96. Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1305 (N.D. Ga. 2006).

97. *Id.*

98. *Id.*

99. *Id.* at 1304.

100. http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1637&Itemid=113.

101. Mississippi Democratic Party v. Barbour, 491 F. Supp. 2d 641 (N.D. Miss. 2007).

102. *Id.* at 645.

103. *Id.*

members.[104] Needless to say, this is not quite the relief that the Democrats wanted as their motion for reconsideration was denied.[105]

Of course, the fact that the passage of these voter identification laws is intensely partisan does not render them unconstitutional. Indeed, bills pass or fail along party lines all the time. But when the bill is in the area of elections it does, however, justify a more skeptical analysis of the proffered reasons for the law. When an election law passes on an overwhelmingly party-line basis there is almost certainly some partisan advantage and perhaps it is worth considering whether any other stated reason is pretextual.

V. THE CONSTITUTIONALITY OF VOTER IDENTIFICATION LAWS

Under the Supreme Court's balancing test articulated in *Burdick*, the threshold determination must be the nature of the burden imposed by the voter identification laws. If the burden is severe, then the statute must be supported by a compelling state interest. If however, the burden is "reasonable" and "non-discriminatory," then the statute need only support the state's "important regulatory" interests.[106]

Are voter identification requirements a severe restriction on voting rights? It hardly seems likely, as not a single person in Indiana indicated that they were discouraged from voting by the requirement. Similarly in Georgia, the plaintiffs indicated that they would obtain the necessary documents if the statute were upheld. At best, a handful of voters in all of the states combined came forward to indicate that they would be adversely impacted by the identification requirement. Moreover, the evidence supported the conclusion that each of these people would be able to obtain the identification without much inconvenience. As a result, the Courts' conclusion that these laws were not severe burdens is supportable.

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104. *Id.* at 662. ("The reason that requiring voter identification in this instance is a proper exercise of federal power and not mere 'judicial legislation'-other than the logical conclusion drawn from the Complaint's own language asking the court to enjoin the State from not providing a means for the Party to verify who participated in its primary . . . -is that the constitutional right asserted in this case, the right to disassociate, presumes the ability to accurately identify voters as those with whom the plaintiffs want to associate and disassociate. This requires party registration and voter identification. As it noted in its June 8, 2007 opinion, however, the court did not rule that voter identification was required in general elections because general elections are not at issue in this case and such a requirement is not tied to an asserted constitutional right to disassociate").

105. *Id.*

106. *See* Burdick v. Takushi, 504 U.S. 428, 433, 433 (1992).

This does not, however, end the inquiry. Because these voter identification laws do not impose severe burdens, they need not be justified by a compelling state interest. Nevertheless, there must be "reasonable and non-discriminatory" methods of supporting the important regulatory state interest.[107] The voter identification laws are certainly non-discriminatory in that they apply equally to all potential voters. No groups of citizens are exempt from the identification requirement. The plaintiffs in these cases argued that these requirements unduly burdened particular groups, such as the poor, the elderly, and the infirm.[108] However, all election related laws affect people in different circumstances in different ways. A healthy person can more easily walk to the polling place than a sick or injured person. A driver can get to the polling place easier than those that must take public transportation. Does that render the polling place system unconstitutional? Because each citizen must go through exactly the same steps to obtain the necessary identification, and can do so under the same conditions as everyone else, the voter identification laws are non-discriminatory.

That leaves the question of whether these laws are reasonable to support an important regulatory state interest. At first glance, this appears to be an easy question to answer: who could argue that prevention of voter fraud is not an important state interest? Indeed, courts have consistently recognized fraud prevention as a legitimate state interest.[109] But does the voter identification requirement help achieve the goal of fraud prevention?

The single most consistent fact in these cases is the lack of evidence that in-person, Election Day voter impersonation ever occurs. None of the cases reported even a single instance of someone being charged or convicted with that offense. Judge Posner, in his *Crawford* decision, attributes that to the "endemic under enforcement of minor criminal laws."[110]

First of all, anyone with my history of parking citations would certainly take issue with Judge Posner's description of law enforcement's enthusiasm for enforcing minor crimes. Moreover, Judge Posner does not say why it would be more difficult to apprehend a voter impersonator than a shoplifter. More importantly, if true, this explanation would only explain why no one was ever charged or convicted of

107. *Id.*

108. *Cf.* In re Request for Advisory Opinion Regarding Constitutionality of 2005, 740 N.W.2d 444, 458 (Mich. 2007).

109. *Cf.* Nadar v. Keith, 385 F.3d 729, 734 (7th Cir. 2004).

110. Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007).

voter fraud. These cases also lacked any evidence anyone had ever witnessed, complained of, or even suspected any in-person voter impersonation.

Instead, Judge Posner himself supplies the reason why voter impersonation does not occur in polling places, which is it doesn't accomplish anything. According to Judge Posner, the benefit to the individual in voting is minimal, or "elusive" to use his word, because an individual vote "rarely has any instrumental value."[111] One vote does not have much impact because an individual voter never has the opportunity to cast the deciding vote.[112] If Judge Posner's supposition is true, why would anyone run the risk of apprehension and prosecution as a vote impersonator if there is no chance that the stolen vote would have any impact on the results? Indeed, the only way for voter fraud to be effective would be for an individual to either become a serial voter impersonator or appear numerous times at multiple polling places throughout Election Day or to join together with like minded individuals in a concocted scheme to snatch the election through strategic impersonations. Either alternative would no doubt greatly increase the risk of detection and apprehension. Surely, even a single instance of serial or schematic voter impersonation would have come to the attention of election authorities in one of these states, regardless of whether the culprits were ever charged with or convicted of anything.

The unreasonableness of these laws is clarified considering the mix of the intensely partisan nature in which these laws come into being. In each state legislature, the passage of these bills was overwhelmingly supported by one party, and equally opposed by the other. For example, Arizona voters approved the voter identification law the same day they gave George Bush a landslide victory.[113] This alone says nothing about these laws' constitutionality, but it does support the conclusion that the stated reason, voter fraud prevention, was perhaps at least partly pretextual and that partisan advantage was at least an equally important motivation. Did the Democrats who opposed these bills really support commission of voter fraud?

Legislatures certainly should have the right to address problems with foresight, rather than hindsight.[114] The Michigan Supreme Court's prediction that "a State's political system sustains some level of damage before the legislature could take corrective action" and that any such action "would invariably lead to endless court battles

111. *Id.* at 951.

112. *Id.*

113. *See* (http://www.command-post.org/2004/2_archives/cat_arizona.html).

114. *See* Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986).

over the sufficiency of the 'evidence' marshaled by a State . . . " is certainly overblown.[115]

There can be no dispute that these laws on their face impose limits on eligibility to vote on Election Day, because at a minimum, as Judge Posner recognized, "a few people who have photo identification but forget to bring it to the polling place will say what the hell and not vote . . . ."[116] When a state acts to restrict voter participation and does so ostensibly to address a problem, it is not too much to require that the alleged problem at least to some degree exists. In his dissent in the Michigan opinion, Judge Cavanagh put it succinctly: "[i]t is not reasonable to impose a photo identification requirement when the alleged interest is nonexistent in-person voter fraud, especially when the requirement will significantly impinge upon the rights of thousands of Michigan's citizens."[117]

In upholding these photo identification laws, courts appear to treat the *Burdick* balancing test as an either/or proposition. If a challenged statute imposes severe restrictions on voting, it must survive strict scrutiny.[118] If, on the other hand, a court determines that the burden is not severe, they appear to simply apply rational basis review.[119] Rather than treat *Burdick* as an either/or analysis, however, courts should view *Burdick* as an intermediate level of scrutiny that always demands more justification than a statute subject to rational basis review. This conclusion is supported by the Supreme Court's description of the state interests for various levels of scrutiny: laws subject to strict scrutiny must meet a state's "compelling" interest; those subject to rational basis review must satisfy a state's "legitimate" interest; but election laws imposing non-severe burdens on the right to vote must satisfy the state's "important regulatory" interests.[120] In *Burdick* the Supreme Court used a term other than "legitimate" when describing the necessary state interest that indicates it intended to apply a different, and heightened, level of scrutiny to even those laws that impose non-severe burdens on the right to vote.

This intermediate level of scrutiny is further justified because any election related statute, regardless of whether or not it imposes a

115. In re Request for Advisory Opinion Regarding Constitutionality of 2005, 740 N.W.2d 444, 458 (Mich. 2007).

116. *Crawford*, 472 F.3d at 951.

117. *In re request for Advisory Opinion*, 740 N.W.2d at 486 (Cavanagh, J., dissenting).

118. *See* Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006).

119. *See* Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007); *In re Request for Advisory Opinion*, 740 N.W.2d at 472-483.

120. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

severe burden, could have the effect of restricting the fundamental right to vote. In other words, a state should never restrict the right to vote and escape with simple rational basis review. If the state acts to restrict that right, even in a manner that is not severe, it should be subject to heightened but not strict scrutiny.

That is not to say that the legislature must justify its actions before it acts. Instead, once a plaintiff establishes that an election related law has the facial effect of constricting voter participation, the state should be able to demonstrate that the law is a reasonable method to achieving an important state goal.[121] Under this scenario, as a threshold matter a plaintiff would be required to demonstrate the challenged law has the effect of diminishing electoral participation. If the plaintiff makes such a showing, the burden would shift to the state to demonstrate that the law is reasonably tailored to attain its important goals of regulating elections.

In these reviewed cases, the plaintiffs have satisfied their burden because the voter identification laws will, as Judge Posner recognized, necessarily result in reduced participation. Based upon the evidence from these five cases however, the states have not demonstrated that in-person, Election Day voter impersonation is a real, or even potential problem. Because there is no evidence that in-person voter impersonation is a problem, the laws are not reasonably designed to achieve an important regulatory interest. In short, solving a nonexistent problem cannot be fairly described as an important state interest sufficient to support a law restricting voter participation.

VI. CONCLUSION

Voter identification laws are a solution in search of a problem. The lack of any allegations of voter impersonation compels the conclusion that these laws are not reasonably designed to achieve the states' interest in preventing vote fraud. Instead, what these laws will accomplish, according to the evidence in the reviewed cases, is to discourage at least some citizens from voting.[122] Election laws should encourage all eligible citizens to participate, and laws that restrict participation should be reasonably designed to help the state administer its elections. When it comes to laws constricting participation in our electoral system, the state cannot reasonably solve a problem that doesn't exist.

121. *See In re Advisory Opinion*, 740 N.W.2d at 485 (Cavanagh, J., dissenting).

122. *See* Crawford v. Marion County Election Bd., 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting).

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